No. 18,825

United States
COURT OF APPEALS
for the Ninth Circuit

UNITED STATES OF AMERICA, for the Use and Benefit of Miller & Bentley Equipment Company, Inc.,

Appellant,

v.

JAMES H. KELLEY (KELLY) and UNITED PACIFIC INSURANCE COMPANY,

Appellees,

and

MAURICE RAMAGE and FRED AYALA,

Defendants.

BRIEF OF APPELLEES

Appeal from the District Court for the District of Alaska

PAUL R. MEYER,
KOBIN & MEYER,
314 Oregon Bank Building, Portland, Oregon 97204
McNEALY & MERDES,
Post Office Box 1912, Fairbanks, Alaska,
Attorneys for Appellees.

STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 11–63

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

Page

Cases

Statutes

No. 18,825

United States
COURT OF APPEALS
for the Ninth Circuit

UNITED STATES OF AMERICA, for the Use and Benefit of Miller & Bentley Equipment Company, Inc.,

Appellant,

v.

JAMES H. KELLEY (KELLY) and UNITED PACIFIC INSURANCE COMPANY,

Appellees,

and

MAURICE RAMAGE and FRED AYALA,

Defendants.

BRIEF OF APPELLEES

Appeal from the District Court for the District of Alaska

JURISDICTION

Appellees accept appellant's statement of jurisdiction.

STATEMENT OF THE CASE

Plaintiff's complaint was filed August 19, 1959, seeking judgment against defendants Ramage and Ayala

on contract and against appellees on a Miller Act bond. The District Court decided the case on summary judgment on August 16, 1961, in an opinion reported at 192 F. Supp. 274.

Appellant appealed from that judgment specifying as error the District Court's granting appellees' motions for summary judgment numbered 2 and 8 relating to alleged tractor rentals and labor and material furnished to the tractors in an attempt to make them operable. In its opening brief appellant waived its appeal from the granting of appellees' motions for summary judgment numbered 4, 5, 6 and 7.

This court in its per curiam opinion of February 1, 1963 (Case No. 17,730) affirmed the District Court's granting summary judgment on motions numbered 2 and 8. That judgment thereupon became the law of the case.

Appellees' cross appeal from the original summary judgment resulted in this court reversing the summary judgment in favor of appellant for the sum of $5,726.21. This court had assumed that this judgment was solely "for the rental of equipment (other than that which was the subject of the appeal of appellant) furnished by appellant to the subcontractor at the job site." Based on this *assumption,* the court remanded the case to the District Court to determine whether under all the facts and circumstances the "termination of the subcontract [on January 13, 1959] should have started this [90-day] period running."

On the trial on remand it appeared from the evi-

dence that the only equipment of subcontractor ever used at the job site for the prosecution of the work was the two tractors being purchased under conditional sale contracts which were the subject of appellant's previous appeal. Although the previous appeal had affirmed the District Court's granting of summary judgment on appellees' motion number 8 and had precluded appellant from recovering for materials allegedly furnished in an effort to make these two tractors operable, it appeared on remand that virtually the entire amount of appellant's remaining claim consisted of labor and materials and certain rented items used away from the job site exclusively in an attempt to make the conditional sale tractors operable.

The two tractors, of course, never were capable of performing the required work. The subcontract with defendants Ramage and Ayala was entered into on October 22, 1958, and provided for completion no later than January 1, 1959. When the subcontract was terminated and the two tractors removed from the job site on January 13, 1959, scarcely half the work had been performed. Appellee Kelley, using one tractor of his own (smaller in size than either of the two tractors attempted to be used by the subcontractors), completed the remaining work in approximately three weeks.

Based on the record of appellant's case alone the District Court found that:

> "Under the facts and circumstances of this case, plaintiff did not, subsequent to January 13, 1959, furnish any labor or materials used in the prosecution of the work provided for under defendant

Kelley's contract with the United States" (Finding of Fact VIII).

"Under the facts and circumstances of this case, the termination of the subcontract on January 13, 1959, started the 90-day period running." (Finding of Fact VI)

"The 90-day period within which plaintiff was allowed under the Miller Act to give written notice to defendant Kelley, the general contractor, of its claim expired on April 11, 1959. Plaintiff was not reasonably diligent in making its claim." (Finding of Fact VII)

The District Court heard two full days of testimony on April 30 and May 1, 1963. At the conclusion of the second day, appellant rested and appellees moved to dismiss the action. The District Court took the matter under advisement and adjourned the trial until 10 a.m. the following day, at which time the court orally delivered a prepared opinion. Because this court has indicated it will consider a memorandum opinion to provide a more ample understanding of the legal issues and to interpret or supplement the findings (see *American Pipe and Steel Corp.* v. *Firestone Tire & Rubber Co.* (CA 9, 1961) 292 F.2d 640, 642) we are reprinting the court's opinion as Appendix A to this brief.

QUESTIONS PRESENTED

Appellant misstates the question on appeal as "whether a supplier has the full statutory period of ninety days in which to give the required notice." (App. Br. p. 5). The question which this court remanded to the District Court was whether as a factual matter in

this case the "termination of the subcontract should have started this period running." On this issue, the District Court found, after hearing appellant's case, that, under facts and circumstances, it did. (See Findings VI, VII and VIII, supra, pp. 3-4.)

Appellant did not make the transcript of testimony or the evidence a part of the record on appeal herein. These findings cannot be attacked therefore as unsupported by the record. This court should not be asked to speculate as to what labor and materials or equipment rentals are the subject of appellant's remaining claim and ignore the above findings of the court.

See McBee v. U. S. (C.A. 10, 1942) 126 F.2d 238; cert. den. (1942) 317 U.S. 691, 87 L. ed 554, 63 Sup. Ct. 263.
Leimer v. Mut. Life. Assur. Co. (C.C.A. 8, 1939) 107 F.2d 1003.
Hargraves v. Bowden (C.A. 9, 1954) 217 F.2d 839.

ARGUMENT

I. The giving of the 90-day notice is a condition precedent meant to protect a general contractor from double liability and to require diligence on the part of a supplier having no contractual relation with the general contractor.

The 90-day notice required by the Miller Act is a condition precedent to recovery, of which the burden of proving is on the claimant.

Fleisher E. & C. Co. v. United States (1940) 311 U.S. 15, 61 S. Ct. 81, 85 L. ed. 12.

Bowden v. United States (C.A. 9, 1956) 239 F.2d 572; cert. den. sum. nom. United States ex rel Mallory v. Bowden (1957) 353 U.S. 957, 77 S. Ct. 864, 1 L. ed. 2d 909.

Cooley v. Barten & Wood, Inc. (C.A. 1, 1957) 249 F.2d 912.

United States v. Mass Bonding & Ins. Co. (C.A. 3, 1959) 272 F.2d 73.

The legislative history cited by this court in the *Bowden* case indicates clearly the equitable requirement of diligence on the part of the supplier.

> " 'One protected by the bond must be vigilant in the prosecution of his rights thereunder or take the chance of finding the bond depleted by the executions of those more prompt than he, or perhaps find the door entirely closed against his suit by limitation. "Equity aids the Vigilant" ' H. Rep. No. 1263 (74th Cong., 1st Sess.)." (239 F.2d at p. 578)

The court's finding in this case was that "Plaintiff was not reasonably diligent in making its claim." (Finding of Fact VII).

II. On rented equipment, the notice period runs from the time the equipment was last available for use in prosecution of the work (i.e., was last located at the job site).

Plaintiff's brief, at page 7, states that "Under the Act appellant had ninety days after whatever date the law establishes as the date upon which the ninety day period commences." This date is specified in the statute as "the date on which such person did or performed the last of the labor or furnished or supplied the last of the material * * *." (40 U.S.C.A., Section 270b)

With respect to labor or items of material actually furnished, the date, of course, is determined by the date of delivery. With rented equipment, however, "the notice period runs from the time the equipment was last available for use on the project."

United States v. Campbell (CA 9, 1961) 293 F.2d 816; cert. den. (1962) 368 U.S. 987, 82 S. Ct. 601, 7 L. ed. 2d 524.

That appeal involved two suits under the Miller Act tried together but decided separately. In March, 1956, plaintiff leased earth moving equipment to a subcontractor on each of two public projects, one at Fort Funston and the other at Travis Air Force Base. Campbell was the prime contractor on both projects, but the sureties were different on each job—Fidelity on the Funston job and Phoenix on the Travis job. Plaintiff's original lease agreement was for the subcontractor to use the equipment at Funston and not elsewhere, but subsequently plaintiff agreed to the use of the equipment at Travis. The District Court awarded plaintiff judgment against Fidelity on the Funston job for rental for the period during which plaintiff's equipment was "located" or "available" at the Funston job site, less an amount of rental previously paid plaintiff by the subcontractor. In appealing this judgment, plaintiff argued that the award was inadequate

> "* * * because it was based upon the *actual use* of the equipment at the *Funston* project; appellant should be compensated, it contends, for the time during which the equipment was *available* for use at Funston, even if it was not actually used all the time. This, however, is a false issue (and the battle of case authority which the parties have en-

> gaged in with respect to it is irrelevant), for the court's computations purport to award rent for the time during which the equipment was 'located at' Funston * * * and it does no appear that 'available at' means anything other than 'located at,' especially when it is noted (as will be shown below) that appellant's computation of the 'availability' of particular equipment at various places corresponds significantly and almost precisely with the court's computation of when the equipment was 'located at' those places." (293 F. 2d at p. 818)

Thus, the court in the Fidelity case concerning the Funston job held that leased equipment is "supplied in connection with the bonded job" within the meaning of the Miller Act only while it is "available for use" or "located at" the job site. In fact, the claimant in that case admitted, and the court agreed, that to argue for more than such result would be "inequitable." The court went further and indicated that recovery of more than such amount would be "beyond the contemplation of the Act."

> "Appellant does not contend, however, that the surety on the Funston project should be held for the whole amount of rental allegedly due for equipment used on both projects. It admits that such a result would be inequitable. Furthermore such a result would be beyond the contemplation of the Act. 40 U.S.C.A. § 270b makes the surety liable only for material supplied in connection with the bonded project." (293 F. 2d at p. 818)

The second Campbell case relating to the claim against Phoenix on the Travis job dealt with the question of when rental or leased equipment is "last furnished" for purposes of determining timeliness of the required 90-day notice. The District Court had denied

claimant recovery and this court affirmed that judgment. In so doing, the court reaffirmed *Bowden* that the required notice is a condition precedent to a claim against the bond. Appellee Phoenix had argued that the leased equipment was last furnished to the Travis job the date it was first delivered to the subcontractor, arguing for an analogy to the delivery of materials. The court would not accept that argument.

> "With respect to materials the crucial date to start the notice period is, of course, the date the materials are delivered. So, by analogy appellee arrives at the conclusion that the crucial date for equipment is the date the equipment is delivered.
>
> "The lack of merit in appellee's position seems obvious. Delivery of the materials completes the seller's obligation, and full payment becomes due either at once or at a specified time thereafter. Delivery of equipment under a lease, on the other hand, is only the beginning of lessor's obligation. *He must allow the equipment to remain in the hands of the lessee for such time as is specified by the lease arrangement. Payment is not due at once, but at various times during the lease period, usually on a periodic basis. Under appellee's theory, a lessor would, more frequently than not, have to file a Miller Act notice even though the lessee is not in default.* If the lease was to run for more than three months, the lessor, in order to protect the rights would have to file a notice after three months, *even though the lessee had met every rental payment promptly.*
>
> "We hold the correct solution of the problem is the one advanced by appellant. It contends the notice period runs from the time the equipment was last available for use on the project. In the instant case, the parties agreed by stipulation that December 5, 1956, was the last day on which any of the

> leased equipment was at the Travis job site. Thus the one notice which the court found to be adequate from a contract standpoint was not timely. This is plaintiff's Exhibit No. 5, a letter dated *March* 8, 1957, and mailed to the contractor (Campbell) on March 12, 1957." (293 F. 2d at p. 820) (Emphasis added)

The only case other than *Campbell* which we can find dealing with the question of when rental equipment is last furnished is the case of *United States for use of Marlin* v. *F. D. Rich Co.* (ND Fla., 1961) 199 F. Supp. 939; Aff'd. per curiam sub. nom. *F. D. Rich Co* v. *United States* (C.A. 5, 1962) 308 F.2d 807. In that case plaintiff rented certain construction equipment to a subcontractor on August 30, 1960, for an initial one-month rental period. The subcontractor defaulted on the job and the payment of the rental and the equipment lay idle *on the job site* from September 30, 1960, until April 20, 1961, when it was repossessed by plaintiff. Thereafter and within 90 days of April 20, 1961, plaintiff gave the general contractor the required 90-day notice. The question presented was whether the September 30 or the April 20 date was the date upon which the equipment was last furnished. The court dismissed the action holding that the September 30 date was controlling.

> "Had plaintiff been diligent, he could have apprised Rich or the sureties within the 90-day period, and could have protected his rights under the Miller Act. Plaintiff knew where his equipment was, and did in fact retrieve it after a delay of almost seven months. While the Miller Act was designed for the purpose of protecting laborers and materialmen to the extent of their labors and materials fur-

> nished, the Act places upon these preferred persons an obligation of certain diligence" (191 F. Supp. at p. 941)

As previously indicated, the District Court in the case at bar found that plaintiff was not reasonably diligent. The undisputed evidence before the District Court which had previously been before this court indicated that plaintiff contracted with defendants Ramage and Ayala to receive substantial payments every two weeks commencing November 27, 1958. Despite all the claims made by plaintiff, no payment was ever received from a subcontractor other than a "bum check." Plaintiff's president admitted that he went to the job site at least two times in December, 1958, to check the job and was made aware of all the problems that the subcontractors were having in attempting to prosecute the work with the defective tractors. The District Court in his oral opinion noted that "there was trouble with the collection of this account from the end of the first month. We note that no payment was made thereon except a NSF check * * *." The District Court disbelieved testimony of plaintiff's officers that they were not concerned about the default and concluded "obviously it appears to me that they were and should have been."

The *Campbell* and *Rich Co.* cases expressly indicated the significance of the lease period and the question of the lessee's defaults in payment as they relate to the diligence of the supplier.

III. Under the facts and circumstances of this case, appellant was not reasonably excused from performance of the statutory conditions precedent.

The District Court in its decision held that the date of January 13, 1959, when the equipment was removed from the site, under the *Campbell* case, "must govern as to the running of the statute * * * unless we find that the claimant was reasonably excused from performance and therefore the circumstances of each case must govern." The court following the instructions of this court on the remand determined that the January 13, 1959, date was controlling under the facts and circumstances which were before him, the record of which appellant did not choose to bring before this court. The District Court further found that the facts and circumstances did not justify extending the statutory 90-day period to accommodate a non-diligent claimant.

The only case cited by appellant is not in point. *United States* v. *Endebrock-White Co.* (C.A. 4, 1960) 275 F.2d 57, 79 ALR2d 836, dealt with a supplier furnishing materials to a subcontractor where the purchase orders specifically indicated that the materials were intended for a bonded job. The court held that wrongful diversion by an employee of the last item ordered by a party who was at the time a bona fide and existing subcontractor, would not cause the 90-day period to run from the next to last item furnished. Compare: *United States* v. *Peter Reiss Construction Co.* (C.A. 2, 1959) 273 F.2d 880, 78 ALR2d 409; affirming (ED NY, 1959) 174 F. Supp. 264.

In the case at bar, defendants Ramage and Ayala after January 13, 1959, were not subcontractors on a bonded job. In *Endebrock-White,* Mechanical was in fact the subcontractor when the last item was ordered and furnished on December 31, the date when the 90-day period commenced. Further, the District Court here specifically found that after January 13, 1959, plaintiff did not furnish any labor or materials used in the prosecution of the work on the bonded job. See: *St. Paul-Mercury Indemnity Company* v. *United States* (C.A. 10, 1956) 238 F.2d 917.

CONCLUSION

Appellant asks this court to establish a rule that a *nondiligent* claimant may extend the time for commencement of the 90-day notice period by closing its eyes to the actual and objectively ascertainable facts. The District Court, on remand, determined that, under the facts and circumstances of this case, appellant was not diligent, and that it failed in its burden of showing why it should be excused from being governed by these objective facts.

Appellees pray that the judgment of the District Court be affirmed.

Respectfully submittted,

KOBIN & MEYER,
MCNEALY & MERDES,
By PAUL R. MEYER,
Attorneys for Appellees.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with those rules.

PAUL R. MEYER

APPENDIX "A"

Opinion of the Court

At 10:00 a. m. on May 2, 1963, at Fairbanks, Alaska, The Court announced its decision on the defendants' motion to dismiss the foregoing action, as follows:

THE COURT: In arriving at a decision on the very important question raised by the defendants' motion to dismiss, by reason of failure of the plaintiff here to give the ninety day notice required by law, we must bear in mind first, the express provisions of the statute which gives a remedy, directs a remedy, and that is Section 270 (b) of Title 40, United States Code, which specifically requires as a condition precedent to the right of action—that is, it has been so held in many cases—that where a contractual relationship is with a sub-contractor and not the contractor, the supplier must give written notice to the contractor within 90 days from the date on which the last services were performed or material furnished, stating with substantial accuracy the amount of the claim, the nature of it, which may be served by registered mail.

The reason for this rule has been discussed many times by the Courts. It is intended by Congress for the protection of the contractor, in order that he may possibly take care of the claim before paying off the sub-contractor, and also for the protection of the bonding company, in order that the company may meanwhile prevent default or loss, as is often done. It is also for the protection of the supplier, so that he has a claim against the contractor and the bonding company, providing he is diligent in giving such notice.

It is a matter which we cannot waive because it is a condition precedent to suit, and is therefore not merely technical.

We must also bear in mind that the claim must be for labor and materials furnished in the prosecution of the work, and that the ninety day period begins to run from the date that the materialman did or performed the last of the labor or furnished the last of the material for which the claim is made.

It has been held many times that the statute applies to equipment rentals, but that such are likewise limited to rentals of equipment used in the prosecution of the work. And it has been specifically stated by the Court of Appeals for the Ninth Circuit in the case of United States vs. Campbell, 293 F. 2d 816, the period commences to run when the equipment was last available for use on the project. And that decision, of course, is absolutely binding upon this court.

So we have here then, the question, the fundamental question of when does the notice period commence in this case? In this connection I find a difference, a very material difference between the equipment supplier to claim against the lessee for rentals which, as Mr. Miller correctly stated, is ordinarily, according to their practice, a period running until the equipment is returned to their yard. That is quite reasonable, but does that apply to a claim against a contractor and his bond under the Miller Act?

I find that it does not. Doubtless plaintiff here would have just remedy against Ramage and Ayala, they could recover rentals until the equipment is returned. But that is not our problem here.

The problem here is whether Mr. Kelley, the contractor, and his surety, are responsible for such rentals. The answer is no. They can be responsible only for the use of the equipment when last available for use on the project or used in the prosecution of the work.

The sub-contractor was terminated on January

13, 1959, and the equipment removed from the site either then or very shortly thereafter. This date, then, must govern as to the running of the statute rather than the date, as contended by plaintiff, as to when plaintiff was informed of that fact, unless we find that the claimant was reasonably excused from performance, and therefor the circumstances of each case must govern.

Now I hold that the written notice of April 28, 1959, sent by registered mail to the defendant Kelley at the address at which he was then living and had his place of business, was sufficient notice under the Act, if timely made. I feel that counsel for plaintiff was very diligent in taking the action, as he has testified, best calculated to give notice, and that there is no reason why such notice is not in full compliance with the Act and, therefore, that the notice served by the marshal on May 12 is superfluous, and we are not particularly concerned with that date.

I have examined briefly the case cited to me by counsel of Houston Fire & Casualty Insurance Co. vs. United States, 217 F. 2d 727 (729), to the effect that oral notice to the contractor may be sufficient where written acknowledgement is made by the contractor of the claim. But we do not have that situation here, according to the evidence.

Now the Circuit Court has indicated that notwithstanding the failure of the contractor to give notice of the termination of the contract, the court may consider whether or not the plaintiff as a reasonably prudent supplier, should have known of it, or should have known of the removal of the equipment and the no longer use on the project of the equipment.

I am compelled to find from the evidence in this matter, that the plaintiff or supplier here, as a reasonably prudent person or supplier, should

have known that the equipment was no longer being used. Now we note that there was trouble with the collection of this account from the end of the first month. We note that no payment was made thereon except an n. s. f. check, of which Mr. Bentley was fully aware when the check was returned, on February 26th or thereabouts. We note that one of plaintiffs' mechanics was called to the site on January 30, at which time, according to the witness Phillips, the equipment was not on the site at all.

MR. COLE: Excuse me. Mr. Phillips testimony is not now before the Court Your Honor.

THE COURT: Well perhaps not, if we are strictly limited to the testimony of the plaintiff. I will reject that, strike that.

But that actually there is no dispute of fact that the sub-contract was terminated on January 13, and the Circuit Court has expressly so found in its opinion. The evidence does show that on February 16, the plaintiff was served with a summons and complaint in an action brought against them by Ramage and Ayala, and they made a counter claim in that suit as to their claim for rentals and so on, which was submitted to counsel, but that no claim was asserted against the contractor and his bond until April, although Mr. Bentley knew of his right to go after the contractor and the bond. He testified that he believed the equipment was not on the job at least at that time.

We note that counsel wrote to United Pacific Insurance Co., a defendant here, on February 24, stating that the account was past due and inquiring regarding the bond, but no notice was given the bonding company of this claim. We find that Mr. Miller was made aware of the trouble here, that his job was going bad, by a telephone call while he was on vacation, and on his return about February 4. He had heard rumors in February, I think,

and before, of trouble there. Both managed to seem willing to deny that they were greatly concerned about this default, but obviously it appears to me that they were, and should have been.

I also find that Mr. Kelley gave them notice of the equipment being removed on February 15, and not on March 20 as is claimed, or about which date the equipment was repossessed by plaintiffs.

I am therefore obliged to find that the plaintiff had ample time after the termination of the subcontract to make a claim against the contractor and surety within the ninety day period provided by law, that is, on or before April 11, 1959, and that they were not reasonably prudent in enforcing that right, and that the notice of April 28 was therefore not timely made.

Now this does not mean, as urged by counsel, if we enforce this rule it will be impossible to collect rental accounts against a contractor and surety. What is required is reasonable diligence on the part of the supplier and a showing that in good faith a supplier believed, and had a right to believe, that the equipment was still being used on the job. And I cannot find that that is so, except to, possibly, February 15. But after that plaintiff had nearly two months in which to assert their remedy against the contractor and surety.

I realize that plaintiffs made a bad deal here and have suffered loss, and if we were governed by sympathy, I sympathize with their loss. But we are not, of course, and I feel that Mr. Kelley is not responsible for their loss, of course, but some irresponsible people who mislead the plaintiffs into taking this equipment. A greater part of their loss, of course, has already been disposed of in that they unfortunately made a conditional sale, on these tractors. The other loss is not great, relating to the other equipment rentals, and there is a greater ques-

tion as to labor, as to whether such was supplied under their contract for use of the tractors and/or repair of the tractors.

And I am therefore compelled to grant the motion of the defendants for dismissal upon the grounds that the condition precedent to commencing the action was not complied with. The plaintiffs' complaint may therefore be dismissed with costs. Under the Miller Act it is held that we can allow attorney fees in the discretion of the Court, according to State law, which again is in the discretion of the court. We have no schedule for it. I feel in view of the good faith of plaintiffs in asserting this claim and in view of their loss, that would be unjust, to assess attorney fees. Therefore I will not assess such fees, but only costs.

I do not recall what, if anything was done with reference to the complaint against Ramage and Ayala who were made parties to the suit. I presume that if counsel was interested in judgment against them, we could do so.

MR. COLE: Yes, Your Honor. I shall submit such a judgment.

THE COURT: By default, because they have never appeared. I don't know how much good it will do.

MR. COLE: Yes, Your Honor, we would like that judgment. May I make one further inquiry about the court's findings? As I understand the Court's opinion, the Court has adopted Feb. 15 as the date upon which we should have known the equipment was no longer on the job?

THE COURT: Yes, but I cannot find that that is the date from which the notice commences to run.

MR. COLE: I understand.

THE COURT: I am considering that date with reference to the reasonable diligence in giving notice.

MR. COLE: But at any rate that's the date the Court finds we should have known the equipment was no longer on the job, after that date?

THE COURT: Correct.

MR. COLE: Fine. Thank you.

THE COURT: At least after that date. With regard to your judgment against Ramage and Ayala, of course the equipment was repossessed and I presume you elected your remedy there so far as the tractors were concerned?

MR. COLE: Well, I can discuss that with the Court.

THE COURT: But as to the other relief demanded, I think surely you are entitled to a judgment.

MR. MERDES: Your Honor, Mr. Meyer moved for dismissal of the action.

THE COURT: Yes. Excuse me. The action will be dismissed as the defendants James H. Kelley and the United Pacific Insurance Co. I am glad to make that correction. The Ninth Circuit reminded me that the dismissal of a complaint is not the dismissal of an action. Very well.

MR. MERDES: Thank you, Your Honor. Would the Court's remarks stand as the findings?

THE COURT: No, not an oral decision.

MR. MERDES: I see.

THE COURT: I am just thinking of that. I would request that counsel for plaintiff prepare appropriate findings of fact, conclusions of law and judgment. There is now pending a rule becoming effective July 1, that the Courts must draw their own judgments, so we cannot ask the attorneys to do it, but that rule is not yet effective, and besides which it does not say we cannot ask the atttorney to draw findings of fact, as near as I can figure.

MR. MEYER: Did your Honor mean counsel for the defendant?

THE COURT: Yes—counsel for the defendant. I'm sorry. Is there anything further? If not, I

believe that concludes my work in Fairbanks so we will adjourn this session sine die.

MR. MEYER: I wonder if I could ask a question about Your Honor's findings with respect to preparing them. Has Your Honor made any finding with respect to whether plaintiffs had been advised prior to Mr. Miller's leaving on his vacation of the probability of the termination of this subcontract?

THE COURT: Well, not expressly. I think that is true—well, no, I wouldn't go that far. I don't think it is necessary. We will just fix this date of February 15 as the date on which they were fully informed that the equipment was no longer on the job.

MR. MEYER: You don't mean by that finding to make an implication that they weren't informed before that, or didn't have reason to believe before that?

THE COURT: Well I concur that you may also include a finding that they had reason to believe before that.

MR. COLE: Your Honor, I would like to have a finding as to the date on which, as a reasonable supplier, we were on notice. Now as I understand the Court's opinion, the Court said February 15 was the date on which the Court finds that we were on notice, as of that date, and I accept that date as the date on which the Court so finds.

THE COURT: Well, counsel's request was whether they could put in a finding whether they had reason to believe the equipment was removed prior to that time. I don't think I will go that far. I think doubtless they had reason to believe there was trouble, plenty of trouble, but I can't find they had reason to believe the equipment was removed prior to that time. I don't believe it's necessary.

MR. MEYER: You are not finding to the contrary? That's the only thing — I mean you are not finding negatively on that issue? adversely to

our suggestion? You simply don't feel it is necessary to make a finding on that, and you are not?

THE COURT: I don't feel that it has been sufficiently shown, and also that it is not necessary.

Pardon me, there is one thing more. I will, of course, be back in Anchorage next Monday or Tuesday, so the findings and judgment may be submitted to me there.

(Court was then adjourned)